IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1890.

No. 878.

THE CITY AND COUNTY OF SAN FRANCISCO, APPELLANT,

vs.

EUGENE LE ROY, ET AL., APPELLEES.

Argument of Evans S. Pillsbury, and Gordon Blanding, Solicitors for Claimants and Appellees.

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STATEMENT OF THE CASE.

While the correctness and fairness of the statement of facts by counsel for appellant, so far as it goes, are cheerfully conceded, we respectfully invite the attention of the Court to a more complete presentation of the whole case, that it may the more readily be understood how plain it is in favor of the appel-

lees and how little is really involved in the litigation.

By reference to the map, complainant's Exhibit "B," at the latter part of the record, the whole premises to which appellees assert title will be found within the limits of the blue line thereon. The purpose of this action is to quiet that title as against the appellant. The sources of this title, so asserted by appellees, are as follows:

First. As to all that portion of said tract lying to the South of the North line of Fourteenth street protracted from blue line to blue line (or the southerly red line extended to the blue line) through the original possession of one Thorne, Center and Stewart, under the Van Ness Ordinance, and which will be hereafter designated as the "Thorne & Center" tract.

Second. As to all of said tract lying within the blue line, northerly and easterly of that portion first mentioned, through the original possession of one John W. Kissling, under the Van Ness Ordinance, and to be designated as the "Kissling" tract.

Third. As to all that portion of said "Kissling" tract included within the red line, under a judgment against the appellant in favor of the grantor of the appellees, and

Fourth. A deed from the Tide Land Commissioners of the State of California, of all said tract to the grantor of the appellees, and evidently pro-

cured by him to obviate any question as to his right to that portion thereof formerly covered by the tide waters of Mission Creek, being a narrow strip lying between the west line and the middle of said Creek, and so designated on the right of the map, the blue line being the center of the Creek. That portion of this tract which is enclosed within the green line—being that part of the strip marked "Old Channel St." which extends from the blue line on the east to the blue line on the west—is claimed by the appellant as part of an old abandoned street, which it is not pretended was ever used or opened, and which was *not* marked or designated as a street on the Van Ness map, but was traced upon some subsequent map of the city, at the caprice of a surveyor acting without authority.

This "Kissling" tract was bought by Eugene L. Sullivan, December, 13, 1861, for $26,000; at about the same time he also bought the "Thorne & Center" tract. The deeds by which he acquired these tracts purported to convey to the blue line on the east or *to the center* of Mission Creek. Sullivan held these tracts until October 31, 1876, when he conveyed them to Theodore Le Roy, from whom they passed by descent to the original complainants in this action. On December 3, 1870, said Sullivan obtained a deed to all said tract from the Board of Tide Land Commissioners of the State of California. During the time of the ownership of these premises by Sullivan he put them in condition for cultivation and leased them for vegetable gardens, with the exception of a few house lots, and kept the whole premises enclosed.

Soon as Le Roy bought the premises he proceeded at once to grade and fill them in, completing the work in June, 1880, at an expense of about $10,000. In February or March, 1882, the Superintendent of Streets of the City of San Francisco, without any special warrant or authority of record, as it appears, invaded these premises and undertook to fence in a portion thereof, asserting a claim or title thereto on behalf of said city. This action was commenced in consequence of that interference. On June 14, 1887, a final decree was entered in the Court below in favor of complainants, and on June 11, 1889, barely within two years after the decree, the appeal herein was taken. This delay may perhaps be explained by the fact that under a general order of the city its counsel is required to prosecute appeals from all judgments against it, which in many cases, no doubt, makes such action largely perfunctory.

While the learned counsel for appellant concedes the claim asserted on its behalf to be limited to that portion of the premises represented on the map Exhibit "B," within the green line, and west of the blue line (being that part of "Old Channel St." west of the blue line) under the stipulation, Record p. 12, fol. 18, and consequently omits to discuss the title to the "Thorne & Center" tract, we prefer to briefly present the facts upon which appellees rely to maintain their title to the *whole* tract, in view of the value of the premises and the detriment to result from any possible further interference therewith, and to avoid any question hereafter that it was incumbent upon

complainants to affirmatively make out their title as to all the premises affected by this action.

The possession of the "Kissling" tract by John W. Kissling commenced as early as March, 1849, when he attempted to assert a pre-emption right thereto. Rec. p. 14. Of course we do not pretend that any title could be acquired under this paper, but it is pertinent as tending to show the date and extent of his claim or possession. The witness Thorne, who was living upon the adjoining tract in 1849, testifies that Kissling then had a house and brickyard on these premises, resided there and cultivated a portion of them, *kept stock thereon* and had then entirely enclosed by fences. That his possession was continuous and uninterrupted till he sold to Shaw, in September, 1859. Rec. pp. 16 to 21. He states that, "Referring particularly to that tract represented on the map, Exhibit "B," *within the blue line* and lying to the north of the north line of Fourteenth street extended, I know that Kissling was in the continuous and uninterrupted possession of that land from 1849 up to the time of this conveyance to Shaw." Rec. p. 17. The witness Corbett also was acquainted with Kissling and knew these premises in 1849; also of their possession and use by Kissling, and in 1853 he assisted him in putting *a post and wire fence* around them, including all the portion of the Kissling tract affected by this action, and knew that he had continuous possession until he sold to Shaw in 1859, and was never during all that time disturbed in that possession by any one, not even a city official. Rec. pp. 20 to 23. Mr. Shaw testifies that the premises were in the undisputed pos-

session of Kissling when he bought them in 1859, and there was no interference with his possession from that time till he sold to Sullivan in December, 1861. Rec. p. 26. The witness, Michael Hayes, who was one of the Commissioners under the Van Ness Ordinance, was also acquainted with Kissling in 1849, and knew he was in the actual and undisturbed possession of all this tract, from that year, when he helped him to survey his claim, to the time he sold to Shaw in 1859, and that there was never any question raised as to the right of Kissling to this tract during all this time, and his possession thereof was never disturbed. Rec. pp. 28, 29 and 31.

The possession of the original claimants to the "Thorne & Center" tract from August, 1850 to 1860, is equally as clearly established by the same witnesses, except Shaw. On August 5, 1850, Thorne and Center procured a survey of this tract to be made and filed. Rec. p. 14. From that date to July 15, 1854, they, and one Charles V. Stewart, resided on the premises, and asserted ownership thereof; they cultivated the larger part thereof, and *had them entirely enclosed by fences*, so as to protect them from intrusion; at this latter date Thorne & Center sold out to Stewart, who thereafter occupied them continuously till 1860; *kept the fences in repair during all this time*, and maintained control and possession thereof. Thorne, Rec. pp. 15, 16. Corbett, Rec. pp. 21, 23. Hayes, Rec. pp. 28, 29. The rights acquired by all these parties passed to complainants. Rec. p. 15.

The learned counsel for appellant argues that there could have been no fences on the side of this tract

bordering upon Mission creek, at least not to the center of the creek, but an examination of the evidence shows to the contrary. As already pointed out the witnesses testified that these respective tracts were *entirely enclosed*. Hayes states that Kissling was in absolute possession of the premises represented on map Exhibit "B," *inside of the blue line*. Rec. p. 29. That he knew Kissling claimed to the *center of the creek*, for he helped to survey his claim. Rec. p. 31. Corbett states that he helped Kissling to put a post and wire fence around the *whole* Kissling claim represented on the map Exhibit "B." Rec. pp. 20-21. Thorne states that the portion of the Kissling tract *within the blue line* on Exhibit "B," was entirely enclosed. Rec. p. 17. He says also that the premises were *bounded* on the south and east by Mission creek, of which there is no question; also, that the part of the creek subject to overflow by the tides could be used; that Mr. Center used a part of it as a duck ranch and a part as a hog ranch; kept a large number of hogs in it. Rec. p. 19. That the premises in question were entirely enclosed and occupied. Rec. p. 20.

As to the portion of the tract west of the blue line marked on the map "Old Channel street," no such street was ever projected or laid off until after the Van Ness map was filed. Thorne says: "I am familiar with the Van Ness Ordinance map, and I know that none of the streets thereon named extended through this tract in question." Rec. p. 20. Also, "there are no streets, as they existed on the Van Ness Ordinance map, embraced in these premises lying

east of Harrison street." Rec. p. 19. It seems that one Reddy made an *unofficial* map, with this street laid out on it. Rec. p. 22. Also, that no attempt was ever made to lay out or open a street upon this tract. Rec. pp. 19, 20.

The testimony of the witness Hayes, however, establishes beyond question that there was no street on the Van Ness map corresponding to "Old Channel street," on Exhibit "B," or any streets whatever upon or crossing this tract, and that no part of it was within any of the reservations mentioned in the Van Ness Ordinance. Rec. pp. 29, 30.

It was shown by the witness Grattan, that when Sullivan purchased this tract, in December, 1861, he went into possession of the whole tract within the *blue line*, and continued that possession until he sold to LeRoy in October, 1876; that the premises were entirely enclosed; that the fence on one side extended to and into the *mud of the creek*, and that there were no streets crossing the premises during the ownership of Sullivan. Rec. pp. 27, 28. It was also shown by the witness Coyne, that he filled in the whole tract within the blue line, between the year 1876, and June, 1880; that at the time he commenced to fill in there were no fences *inside* the lines of this tract—the blue line—but that it was invaded by the Superintendent of Streets in February or March, 1882. That he was paid about $10,000 by Le Roy to fill it in. Rec. pp. 23, 24. Hayes testified that there was no creek there at the time of his examination; that it was all filled in within the limits of this tract and for several

blocks above and below; that the creek *had disappeared*. Rec. p. 31.

It was also shown that the deeds from Kissling, Thorne and others to the grantors of complainants included all the premises on Exhibit "B" within the blue line. Record, p. 31. The deed of the Tide Land Commissioners to Sullivan on December 3, 1870, also covered the premises affected by this action. Record, p. 25.

It is conceded on both sides that all the premises affected by this action are within the "pueblo lands" of San Francisco and the corporate limits of said city at the time of the passage of the Van Ness Ordinance, and not within any reservation for military purposes, or any previous Spanish or Mexican grants. Record, p. 26, fol. 37. It was also shown that said premises are within the territory covered by the Van Ness Ordinance map, Record, p. 30, but are *not* within any of the reservations or exceptions mentioned in the Van Ness Ordinance. Record, p. 29. The judgment and decree obtained by William J. Shaw against the appellant in the District Court for the City of San Francisco, quieting his title to all these premises within the red line, appear from pages 36 to 39 of the Record.

Argument on the Facts.

Upon a presentation of the foregoing facts in this case, any extended argument thereon would seem to be unnecessary. A continuous and uninterrupted possession of more than thirty years appears to have

been disturbed by an official acting without warrant or authority. There can be no question that, under the Van Ness Ordinance, parties in the actual possession of lands on or before January 1, 1855, which were within the corporate limits of San Francisco, and not reserved, became the owners thereof. The State of California relinquished its claims to all such lands. A more complete possession than was shown by the evidence to bring the premises involved in this action within the benefit of the Van Ness Ordinance could scarcely be established. If the owners of a large portion of the real property in San Francisco, the title to which depends on that ordinance, were put to the proof, there would be few instances where as complete a possession could be shown as that made out by the complainants. There is no occasion to look into the character of that portion of the tract once covered by the waters of Mission Creek, to ascertain whether it was tide land or not, for the title of the State likewise passed to those *in possession*. It seems that this Mission Creek was a kind of estuary of the Bay of San Francisco, carrying a small drainage from the adjoining hills and filled by the regular tides; there were low, marshy or swamp lands contiguous thereto; the marsh lands and the creek were reclaimed by filling in; even if treated as a running stream, the riparian owners would take to its center; it was represented on the map as of a width of seventy-five to a hundred feet, which must have been intended to cover the limits of the highest tides, for the witness Thorne, who knew it intimately, states that it was not more than thirty feet wide in places,

and was originally of a very irregular course, and not as it was represented on the map; it must have been only an open space or passage way, such as are frequent in all marsh lands about the Bay of San Francisco. No claim of title is asserted by appellant to the bed of this creek, nor do we see how it could well do so, in view of the following opinion of its legal adviser, given October 16, 1875, as follows:

"In connection with the foregoing it may be here stated "that Eugene L. Sullivan presented a deed of a lot from the "Board of Tide Land Commissioners, dated December 3, "1870, recorded January 5, 1871, which lot was included in "the district known and designated as Mission creek and "Channel street, between Ninth and Eighteenth streets. This "deed was referred to the City and County Attorney as to "the title derived thereunder, who filed the following opinion: "'I have made examination concerning the title to the lands "'described in the deed from the Board of Tide Land Com-"'missioners to E. L. Sullivan, and dated the 3d day of De-"'cember, 1870, and find that the title to all the lands de-"'scribed in said deed is in said Sullivan, inasmuch as the "'lands were salt marsh or tide lands; and the Tide Land "'Commissioners, under the Act of April 1, 1870, (Stat. 1869-"'70, page 540), had authority to dispose of all of the salt "'marsh and tide lands in San Francisco, whether covered by "'a navigable stream or otherwise, and to dispose of such "'lands, although at that time dedicated as a public street; "'and carry title, so that upon the removal of the dedication, "'the title would be in the grantee. Yours truly, W. C. "'Burnett, City and County Attorney. Dated October 16, "'1875.'" Municipal Reports, 1880-81, p. 215.

It would seem that this question came up on account of proceedings to acquire and condemn lands for the purpose of a sewer passing through the section of the city in which the tract in question is situated.

We do not care to enter into any discussion of the question whether the tide lands in the Pueblo of San

Francisco, known as the "Mission Creek lands," were included within the patent of the United States to the City, issued June 20, 1884, in satisfaction of a grant which was confirmed by the decree of the United States Circuit Court for the District of California, May 18, 1865. The Supreme Court of California, in the case of the *United Land Association, et al.* vs. *Knight*, 24 Pac. Rep., p. 818, has held that they were not; but as that case will come to this Court, and the exigencies of this case do not demand a determination of the questions involved therein, we do not invoke that decision, but expressly avoid it. We are content to rely on both sources of title, namely, the Van Ness Ordinance, and the Act of the Legislature of California of 1858, confirming the same and granting to the persons benefitted thereby all claims to the lands of which they were in possession; likewise the deed of the Tide Land Commissioners to Sullivan of all the tract claimed by appellees, made December 3d, 1870.

This brings us to the consideration of the strip within the green lines marked on the map "Old Channel St.," and to which appellant can have no title, as it was not within any of the reservations of the Van Ness Ordinance, and was unquestionably in the actual possession of Kissling on January 1st, 1855; besides the city is cut off from asserting title to all this strip within the red line by the decree against it in favor of Shaw, rendered May 13th, 1861. There was no effort made in defense of this action to show any excuse or justification for

the attempt of the Superintendent of Streets to fence in this strip.

LAW OF THE CASE.

Title passed to those in possession pursuant to the conditions imposed by the Van Ness Ordinance.

Statutes of California, 1858, pp. 50 to 57.
Davis vs. *Perley*, 30 Cal., 630, 637.
Wolf vs. *Baldwin*, 19 Cal., 306.
San Francisco vs. *Beideman*, 17 Cal., 443–463.
Satterlee vs. *Bliss*, 36 Cal., 489, 512.
Carleton vs. *Townsend*, 28 Cal., 219.
Hart vs. *Burnett*, 15 Cal., 530, 612.

The common law rule as to riparian owners is in force in the State of California.

Lux vs. *Haggin*, 69 Cal., 255.

The deed from the Tide Land Commissioners to Eugene L. Sullivan was made pursuant to law.

Statutes of California, 1869–70, p. 541.

In the "Pueblo case," 3 Sawyer, p. 553, the right of the City of San Francisco to the pueblo lands is considered and recognized.

We understand the law to be settled in the State of California, that an action to quiet title may be maintained against the City of San Francisco at the instance of a private person.

San Francisco vs. *Holladay*, 76 Cal., 18.
San Francisco, vs. *Itsell*, 80 Cal., 57, 60.